No. 92-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF ALASKA ON BEHALF OF PETITIONER

CHARLES E. COLE
Attorney General for the State of Alaska

Office of the Attorney General
P.O. Box K - State Capitol
120 4th Street, 4th Floor
Juneau, Alaska 99811-0300
(907) 465-3600

Attorney of Record

RONALD G. BIRCH
J. GEOFFREY BENTLEY

BIRCH, HORTON, BITTNER AND CHEROT
1155 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036
(202) 659-5800

Of Counsel

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The State of Alaska, through its Attorney General, pursuant to Rule 37.5 of the Supreme Court, hereby submits this brief, *amicus curiae*, in support of petitioner, Keene Corporation, for reversal of the decision below by the Court of Appeals for the Federal Circuit in *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992).

INTEREST OF THE STATE OF ALASKA AS *AMICUS CURIAE*

The interest of the State of Alaska in this matter is to correct the ruling below, which erroneously overturned nearly forty years of precedent interpreting 28 U.S.C. § 1500 (1982), and ultimately extended beyond the jurisdiction of the court. Unless reversed by this Court or markedly restricted in its scope, the ruling by the Federal Circuit, on a matter long regarded as "settled," *Truckee-Carson Irrigation District v. United States*,

223 Ct.Cl. 684, 685 (1980), threatens to bar parties such as Alaska from litigating, simultaneously, in the district courts and in the U.S. Court of Federal Claims,[1] separate causes of action, each of which is within the exclusive jurisdiction of the court in which the action is brought and neither of which, if decided on the merits, would be *res judicata* as to the other.

The State of Alaska is the plaintiff in an action in the Claims Court styled *State of Alaska v. United States*, No. 92-314L, filed April 30, 1992. This action, brought under the Tucker Act, 28 U.S.C. § 1491 (1982), seeks compensation due Alaska under the Fifth Amendment to the Constitution (U.S. CONST. amend. V), for the alleged legislative taking of the State's royalty and other property interests in oil reserves found on Alaska's North Slope. The taking is alleged to have occurred as a result of enactment of § 7(d) of the Export Administration Act of 1979 (50 U.S.C. app. §§ 2401-2420) (the "EAA"), and rules promulgated thereunder, adopted by Executive Order No. 12730 (1990), *reprinted as a note in* 50 U.S.C.A. § 1701 (West 1991). The EAA forbade the export of crude oil transported from the North Slope to the port of Valdez, Alaska, via the Trans-Alaska Pipeline System ("TAPS"), unless Congress enacted another law approving an export license granted by the President.

At the same time Alaska filed its complaint in the Claims Court, it also filed a complaint, styled *State of Alaska v. Franklin, et al.*, Case No. A92-364 CI, in the United States District Court for the District of Alaska, pursuant to jurisdiction conferred on that court by 28 U.S.C. §§ 1331 and 1337 (1982). That action seeks a declaration that § 7(d) of the EAA (and § 28(u) of the Mineral Lands Leasing Act of 1920, *as amended* (30 U.S.C. § 185(u)), which the State alleges governs the export

[1] The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506 (1992), changed the name of the United States Claims Court to the United States Court of Federal Claims. References herein to the "Claims Court" should be understood to refer to the Court of Federal Claims.

of TAPS crude oil or would govern if § 7(d) were to be found void or otherwise no longer to be in effect) is unconstitutional. Alaska also asks that the secretaries of Commerce and Interior be enjoined from enforcing § 7(d) and regulations adopted pursuant to the statute. The State's claims in the district court action are premised upon the Tenth Amendment to the Constitution, U.S. CONST. amend. X; the Guarantee Clause of the Constitution, U.S. CONST. art. IV, § 4; the Port Preference Clause of the Constitution, U.S. CONST. art. I, § 9, cl. 6; the Presentment Clause of the Constitution, U.S. CONST. art. I, § 7, cl. 2, 3; and the doctrine of separation of powers.

The United States moved to dismiss the State of Alaska's Claims Court action, pursuant to 28 U.S.C. § 1500 (1982), referring to the decision of the Federal Circuit in *UNR*. In particular, the government relied on the Federal Circuit's unexplained overruling in *UNR* of several cases wherein courts had found § 1500 did not apply or construed § 1500 to find exceptions, including *Casman v. United States*, 135 Ct.Cl. 647 (1956), *Hossein v. United States*, 218 Ct.Cl. 727 (1978), *Brown v. United States*, 358 F.2d 1002 (Ct.Cl. 1966), and *Boston Five Cents Savings Bank, FSB v. United States*, 864 F.2d 137 (Fed. Cir. 1988). *UNR*, 962 F.2d at 1022 & n.3. The State of Alaska opposed the government's motion to dismiss. On October 19, 1992, this Court granted certiorari in the *UNR* case. *Keene Corp. v. United States*, 113 S.Ct. 373, 61 U.S.L.W. 3301 (U.S. Oct. 19, 1992). At that point, Alaska moved in the Claims Court that further action in that court be stayed, pending decision in *Keene* and other cases pending before the Federal Circuit and elsewhere in the Claims Court. The State contended that the Claims Court would benefit from this Court's disposition of *Keene*, including any clarification of the Federal Circuit's overruling of *Casman* and the other cases.[2] The government, while

[2] Alaska's Motion for Stay pointed to other pending cases, including *Loveladies Harbor, Inc. v. United States*, No. 91-5050 (Fed. Cir.), and

not consenting to the State's motion for stay, moved to suspend proceedings pending this Court's decision in *Keene*. After oral argument, the trial court denied both the motion for stay and the government's motion to suspend proceedings as premature. *Alaska v. United States*, No. 92-314L (Order entered by Judge Gibson, October 30, 1992).

This Court's decision in *Keene*, therefore, is likely to affect, in a significant way, the Claims Court's consideration of the government's motion to dismiss the State of Alaska's Tucker Act claim. If *UNR* is reversed, as Petitioner urges, then the Federal Circuit's overruling of *Casman*, and the line of cases following *Casman*, likewise will be reversed. If the holding of the Federal Circuit in *UNR* is affirmed, this Court may, nonetheless, (1) limit its holding to the issues and facts presented by Petitioner's claim and leave the issue whether *Casman* should be overruled to a later day, or (2) vacate that portion of the ruling below which purported to overrule *Casman*.

SUMMARY OF ARGUMENT

The ruling below overturned a premise that had appeared to have been settled for a period of nearly forty years: that 28 U.S.C. § 1500 does not bar the Claims Court from retaining jurisdiction where a concurrent action seeks non-monetary relief that is within the exclusive jurisdiction of the district courts. That this premise had been articulated in a number of different cases over a long period of time was not a result of inconsistent interpretation of the statute. To the contrary, the body of law overturned by the Federal Circuit represented a consistent effort by the Claims Court and its predecessor, the Court of Claims, to balance the exclusive jurisdiction granted

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Whitney Benefits, Inc. v. United States, No. 499-83L (Cl. Ct.), which pose questions regarding the interpretation of § 1500 resembling, more closely than *Keene*, the question presented by Alaska's district court and Claims Court actions.

the district courts, and the preservation of claimants' remedies available only in the district courts, with the original purpose of § 1500: to prevent successive and duplicative litigation in different courts with potentially conflicting outcomes. These rulings were consistent with both this Court's prior interpretation of the predecessor of § 1500, § 154 of the Judicial Code, c. 231, 36 Stat. 1087, 1138; § 1500 itself; and this Court's recently expressed views regarding the distinctions between district court and Claims Court jurisdiction.

The purpose of § 1500, as articulated by this Court, is to create, by statute, effects akin to *res judicata*. *Matson Navigation Co. v. United States*, 284 U.S. 352, 356 (1932). The ruling in *UNR*, although speaking in terms of *res judicata*, did not apply *res judicata* principles. This alone is reason to reverse.

The ruling below also went far beyond the issues before the Federal Circuit. The claimants below all sought monetary damages against the United States in both the district courts and the Claims Court, albeit on different theories of recovery. However, the holding of the Federal Circuit went beyond the issues and facts presented by the parties before the court, and set forth a broad new rule which bars the Claims Court from accepting or retaining jurisdiction over *any* claim when the plaintiff has pending before *any* other court a claim based on the same "operative facts." The broad new rule applies even when (1) the relief sought in the district court is equitable, but not monetary, in nature and beyond the power of the Claims Court to grant, (2) different legal rights are pleaded, (3) there is no possibility that adjudication of the two causes of action could reach conflicting outcomes, and (4) *res judicata* principles would not bar an action in the Claims Court. Because this part of the holding of *UNR* goes beyond the issues necessary to resolution of the controversy presented by the parties, it exceeds the jurisdiction of the court below and should be vacated.

ARGUMENT

I. THE RULING BELOW GOES BEYOND THE INTENTION OF CONGRESS TO CREATE BY STATUTE EFFECTS AKIN TO THE DOCTRINE OF *RES JUDICATA*.

The statute at issue, § 1500, reads as follows:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500 (1982). Section 1500 is the functional ultimate successor to the Act of June 25, 1868, 15 Stat. 75, 77 (1868), which stated:

> Sec. 8. And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

Concerning this section of the Act of June 25, 1868, the Chairman of the Senate Judiciary Committee stated:

> The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) (Statement of Sen. Edmunds).

In short, Congress's purpose in enacting the statute was to prevent plaintiffs from whipsawing the government through forum-shopping and successive litigation in two courts, both having jurisdiction over the same cause of action and authority to grant monetary damages.

Through several revisions and reenactments, the revisers have claimed to make "changes in phraseology only," not of substance. Reviser's Notes, 28 U.S.C. § 1500, 1948 U.S. Code Cong. & Admin. News 1862; *see also UNR*, 962 F.2d at 1018-19. Thus, "only the intention of those who proposed the first version . . . to the Senate in 1868 is available as a guide to the legislative purpose of the section." Schwartz, "Section 1500 of the Judicial Code and Duplicate Suits Against the Government and its Agents," 55 *Georgetown Law Journal*, 573, 574 (1967).

In *Matson*, this Court affirmed a judgment by the Court of Claims dismissing an action by the Matson Navigation Company for recovery of increased wages and bonuses paid under a wartime "requisition charter" for the operation of seven mer-

chant vessels owned by the company. Subsequent to commencement of suit in the Court of Claims, the shipping company had brought separate suits in district court to recover the amounts paid as increased wages and bonuses. The Court of Claims dismissed the action before it on the ground that it lacked jurisdiction under "§ 154 of the Judicial Code, c. 231, 36 Stat. 1087, 1138." 284 U.S. at 355.

This Court, through Mr. Justice Stone, ruled that the legislature's purpose in enacting § 154 was to

> require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be *res adjudicata* in the suit pending in the Court of Claims. . . .

Id. at 356 (citation omitted). In support of this interpretation, this Court cited the statement of Sen. Edmunds quoted earlier in this section.

Because the United States was the named defendant in both Matson's Court of Claims suit and the district court action, this Court held that the shipping company's actions were not within the express language of § 154, which applied where one of the actions was brought against an officer or agent of the United States. *Id.* at 355-56. Similarly, because the United States was the defendant in both actions and would, therefore, be able to rely on *res judicata*, this Court also concluded that the legislative purpose behind the law, i.e., to substitute for *res judicata* principles in circumstances where, as *res judicata* was then defined, such would not be available to the government as a defense, also did not require dismissal of the shipping company's suit in the Court of Claims. *Id.*[3]

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[3] *See also* Schwartz, *supra*, at 574: "[§ 1500] was intended to prevent a suit against the United States based on issues decided adversely to the claimant in an earlier unsuccessful suit against a government officer where the second suit would not have been precluded by rules of res judicata." The Supreme Court affirmed the dismissal of the shipping company's Court of Claims action in *Matson*, not on the basis of § 154 but, rather, in reliance upon the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525-28, under which "jurisdiction of maritime causes of action against the United States, arising out of the operation of merchant vessels for it, is vested exclusively in the district courts." *Matson*, 284 U.S. at 356-57 (citations omitted).

A. The Determination Whether The Doctrine Of Res Judicata Should Apply In The Claims Court Requires More Than A Comparison Of Operative Facts.

The "rule" enunciated in *UNR* is inconsistent with the interpretation of § 154 in *Matson*, and by implication its successor, § 1500, as a law to provide the functional equivalent of *res judicata* effects where such did not exist under the common law of that time. The *UNR* court clearly understood that § 1500, as interpreted in *Matson*, was intended to have effects akin to *res judicata*, as it held:

> *[I]n accordance with the words, meaning, and intent of section 1500*: 1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction . . . 2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction . . . 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, *ordinary rules of res judicata and available defenses apply*.

UNR, 962 F.2d at 1021 (emphasis supplied). The Federal Circuit, however, citing its own decision in *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1565 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989), also held that "for the purposes of section 1500, two lawsuits involve the same 'claim'

if they are based on the same operative facts." *UNR*, 962 F.2d at 1020. That limited scope of comparison is the failing of the *UNR* holding, because the mere congruency of certain operative facts is not sufficient to implicate the doctrine of *res judicata*.

To properly evaluate whether *res judicata* principles would, or should, apply, and, therefore, to determine whether in a particular case § 1500 should bar Claims Court jurisdiction, requires a further level of inquiry. "[U]nder the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the *same cause of action*." *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955) (emphasis supplied). "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." *Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983) (citing *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927)). In determining whether successive lawsuits involve the same cause of action and *res judicata* should, therefore, apply, the following factors are considered:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

C.D. Anderson & Co., Inc. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987) (citation omitted).

The determination of when *res judicata* should apply, accordingly, requires an inquiry that goes beyond a simple comparison of operative facts. While the overlap of "operative facts," or a "transactional nucleus of facts," may be important in determining whether two claims constitute the same cause of action, *see Anderson*, 832 F.2d at 1100, other factors must be considered. As a statute this Court found in *Matson* was in-

tended to codify principles akin to *res judicata*, § 1500 likewise requires a broader inquiry. Inquiry, as in *UNR*, into only the "operative facts," is inadequate and leads to results not contemplated by Congress.

B. The Ruling Below Erroneously Departs From Prior Rulings Which Recognized The Inadequacy Of A Comparison Limited To Operative Facts.

The focus of the Claims Court in *Johns-Manville* and *UNR* on "operative facts" is traceable to the opinion of the Court of Claims in *British American Tobacco Co., Ltd. v. United States*, 89 Ct.Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940). There, the Court inquired, appropriately in light of *Matson*, into whether the plaintiff's district court and Court of Claims suits were based on the same cause of action, but limited its written analysis to a review of the "facts existing and operating in both cases." *British American*, 89 Ct.Cl. at 440.

Notwithstanding the somewhat adumbrated analysis of *British American*, subsequent decisions of the Court of Claims; its successor, the Claims Court; and the Federal Circuit (including *Casman* and other cases), explicitly recognized that comparison of only operative facts was insufficient to determine when two causes of action were sufficiently the same that § 1500 should bar prosecution of one in the Claims Court. The principle of *Casman*, that § 1500 should not preclude Claims Court jurisdiction where a concurrent action sought equitable relief available only in the district courts, was adhered to consistently prior to *UNR*.

Indeed, it was regarded as "settled law that § 1500 does not bar a proceeding in this Court, asking monetary relief, if the other pending suit seeks only affirmative relief such as an injunction or a declaratory judgment." *Truckee-Carson Irrigation District v. United States*, 223 Ct.Cl. 684, 685 (1980) (citations omitted).

This Court, in *Pennsylvania Railroad Co. v. United States*, 363 U.S. 202 (1960), showed no inclination to dispute the premise of *Casman*. In *Pennsylvania Railroad*, the railroad sued in the Court of Claims to recover the difference between lower rates for transportation of steel for export and higher domestic rates, which the General Accounting Office claimed were inapplicable, unreasonable and unlawful. The Court of Claims suspended proceedings to allow the Interstate Commerce Commission ("ICC") to review the rates. When the ICC disallowed the higher rates, the railroad (1) sued in district court to enjoin and set aside the ICC's order; and (2) sought a further stay of the Court of Claims proceedings pending district court review of the ICC's action. The government moved for dismissal of the Court of Claims action, contending that § 1500 was triggered by the railroad's action for district court review. The Court of Claims refused to dismiss the action, but did deny the railroad's request for a stay. *Id.* at 204.

On review, this Court, although it did not rule directly on the applicability of § 1500, held that "since the Railroad had a right to have the [ICC's] . . . order reviewed, and only the District Court had the jurisdiction to review it, the Court of Claims was under a duty to stay its proceedings pending this review." *Id.* at 205-06. It, therefore, appeared that this Court had given its imprimatur to preserving the availability to litigants of different forms of relief available only in different courts.

Against this background, the Federal Circuit noted in *Johns-Manville*, Congress's intention "to force an election *where both forums could grant the same relief*, arising from the same operative facts." 855 F.2d at 1564 (emphasis added). The Claims Court followed *Johns-Manville* when, in *Webb & Associates, Inc. v. United States*, 19 Cl.Ct. 650 (1990), it articulated the standard for dismissal under § 1500 as a *two-part* test:

> (1) whether the potentially conflicting cases arise from the same operative facts, and (2) whether the forums entertaining the cases can grant the same relief.

Id. at 652 (*citing Johns-Manville*, 855 F.2d at 1564); *see also Hill v. United States* 8 Cl.Ct. 382, 386 (1985) (claim encompasses "actions which have the same operative facts and request the same substantive relief."). Although the Federal Circuit purported in *UNR* to "decline to disturb . . . *Johns-Manville*," 962 F.2d at 1024, in fact, it overruled a significant part of the *Johns-Manville* holding, and exceeded the grasp of the statute intended by Congress, when it eliminated the exception found in *Casman* and other cases.

C. The Limited And Exclusive Jurisdiction Of the District Courts And The Claims Courts Over Certain Claims And Remedies Illustrates That Res Judicata Principles Do Not Automatically Require Dismissal Of A Contemporaneous Action In The Claims Court.

It is beyond dispute that the jurisdictions of the district courts and the Claims Courts are nearly mutually exclusive: the power of the district courts to grant declaratory and injunctive relief is, by and large, beyond the jurisdiction of the Claims Court, and the power to grant compensation (beyond $10,000) for the government's taking of a property interest is not within the jurisdiction of the district courts. *See* 28 U.S.C. § 1346(a)(2); *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988). *See also United States v. King*, 395 U.S. 1, 3-4 (1969) (jurisdiction of Court of Claims limited to judgments for money only; equitable and other non-monetary relief not available without express statutory consent).[4] Suits against officers of

[4] Congress has granted the Claims Court very limited jurisdiction to grant declaratory and injunctive relief in government employment and contract actions, 28 U.S.C. § 1491(2) and (3), the availability of which is not at issue here.

the government for declaratory relief are remitted to the district courts. *See Austin v. United States*, 206 Ct.Cl. 719, 726, *cert. denied*, 423 U.S. 911 (1975).

On the other hand, where the amount in issue in the plaintiff's suit against the government for compensation exceeds $10,000, the Claims Court has exclusive jurisdiction. 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1); *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351, 358 (5th Cir.), *cert. denied*, 382 U.S. 829, (1965).

The fact that different relief is sought (for example, equitable relief rather than damages), let alone the fact that the relief sought in one forum may be beyond the power of another forum to grant, certainly serves to distinguish one cause of action from another. In that circumstance, following the four-part test discussed in *C.D. Anderson & Co., Inc. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987), there is less likelihood that rights or interests established by the first judgment would be impaired or extinguished in the second action. Thus, there is less likelihood that *res judicata* would apply. Also weighing against the applicability of *res judicata*, where it is claimed, in the district court, that the Constitution has been violated or that the government has otherwise acted unlawfully, and, in the Claims Court, that a taking of property for a public purpose has occurred without just compensation, the two suits concern infringement of different rights. *See id.*

The independence of separate causes of action for declaratory relief and compensation for a regulatory taking has been aptly summarized by the Court of Claims in a different context. In *Deltona Corp. v. United States*, 224 Ct.Cl. 662 (1980), the plaintiff first sought, in district court, a declaration that the U.S. Army Corps of Engineers had arbitrarily and otherwise unlawfully denied a dredging permit. In a second action, brought by Deltona in the Court of Claims for compensation for property taken as a result of the permit denials, intervenors in the district

court action sought intervenor status in the takings case. The Court of Claims, however, denied intervention because it found the cases "independent of one another." *Id.* at 664.

> [A]pplicants ultimately wish to block Deltona from receiving . . . permits to dredge and fill swamp wetlands. . . . Nothing this court can do will cause the lands to be dredged and filled; that result is a matter entirely in the hands of the district court, with its declaratory and injunctive powers. Should this court determine a taking has occurred, . . . Deltona will be entitled to a sum of money from the United States, but the wetlands will remain intact. If it is decided a taking has *not* occurred, again the status quo is perpetuated. . . . [W]hat ultimately happens to the wetlands will happen regardless of any future decision we may make.

Id. at 665.

Notwithstanding the obvious independence of causes of action seeking declaratory and injunctive relief in the district court and compensation in the Claims Court, the Federal Circuit's enunciation of an overly simplistic "operative facts" standard in *UNR* has led the government to file numerous motions to dismiss. These have included not only Alaska's suit, but also suits for compensation by plaintiffs seeking declaratory and injunctive relief in various other district court actions. Other suits which have been dismissed, or are subject to pending motions to dismiss, include (1) *Southern Ute Indian Tribe v. United States*, No. 92-99L (order of dismissal entered by Judge Bruggink, October 5, 1992), in which an Indian tribe brought suit in district court to enjoin the Secretary of Interior for breaching fiduciary duties to the tribe and in the Claims Court for monetary damages for alleged past failures to protect tribal resources; (2) *Loveladies Harbor, Inc. v. United States*, No. 91-5050 (Fed. Cir.), where plaintiff sued in district court to set

aside a Corps of Engineers' wetlands dredging permit denial, and (3) *Whitney Benefits Inc. v. United States*, No. 499-83L (Cl.Ct.), where the plaintiff filed suit in district court to compel a government tender of coal lands for exchange under the provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq*.

Viewed transactionally, it is inconceivable that all of the Claims Court cases in which the government seeks dismissal pursuant to § 1500 on the basis of *UNR* would be absolutely barred under *res judicata* principles by a decision on the merits in the related district court case. This is because, in light of the exclusive and limited jurisdiction of the district and claims courts, neither court can fashion relief which reaches every aspect of the transaction.[5] If, for example, even though the District Court for Alaska could grant Alaska's request for prospective declaratory and injunctive relief, it could not address the matter of Alaska's claim for compensation for the past legislative taking of its property interest. The parties might be precluded from relitigating certain issues in the Court of Claims, under the doctrine of collateral estoppel, but the doctrine of *res judicata* would not preclude Alaska's separate cause of action for compensation. Indeed, there is no likelihood of the inconsistent outcomes which were at the root of Congress's concern in 1868.

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[5] The evolution of the jurisdiction of the district and claims courts has thus substantially altered the environment in which § 1500 operates. Its predecessor, § 154, was enacted *because* the different courts had concurrent jurisdiction over the same cause of action. The enactment of the Tucker Act, 28 U.S.C. § 1491 (1982), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1982), have largely eliminated the problem of concurrent jurisdiction. Application of § 1500, therefore, not only entails consideration of Congress's intent when the law was enacted but also how that section should interact with subsequently enacted statutes defining and limiting the jurisdiction of the district and claims courts.

Likewise, the Claims Court is not empowered to adjudicate the constitutionality of federal statutes, nor is it suited for inquiry into matters beyond its specialized expertise. The Supreme Court considered the demarcation between district court and Claims Court jurisdiction in *Bowen v. Massachusetts*, 487 U.S. 874 (1988), and concluded that the limited relief available in the Claims Court under the Tucker Act is not an adequate substitute for district court review of the lawfulness of government action. *Id.* at 904

In *Bowen*, the district court reversed a Department of Health and Human Services ruling which disallowed reimbursement to the State of Massachusetts of certain amounts for Medicaid services. The district court "did not purport to state what amount of money, if any, was owed" to the state, or order any payment to be made. *Id.* at 888. On appeal and before this Court, the government argued that the district court could not order the Secretary of Health and Human Services to pay "money damages" to the state and that the Claims Court held exclusive jurisdiction over the state's action under the Tucker Act. *Id.* at 890-91.

This Court, per Justice Stevens, held that the relief sought was not compensation for damages but, rather, enforcement of "the statutory mandate itself, which happens to be one for the payment of money." *Id.* at 900. Of more importance to the present controversy was the Court's discussion of the inadequacy of the relief available in Claims Court litigation:

> The Claims Court does not have the general equitable powers of a district court to grant prospective relief. Indeed, we have stated categorically that 'the Court of Claims has no power to grant equitable relief.' As the facts of this case illustrate, the interaction between the State's administration of its responsibilities under an approved Medicaid plan and the Secretary's interpretation of his regulations may make it appropriate

> for judicial review to culminate in the entry of declaratory or injunctive relief that requires the Secretary to modify future practices. We are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties.

Id. at 905 (footnotes omitted). As further demonstration of the inadequacy of Claims Court review of agency action, this Court noted that

> the nature of the controversies that give rise to disallowance decisions typically involve state governmental activities that a district court would be in a better position to understand and evaluate than a single tribunal headquartered in Washington. We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law. That policy applies with special force in this context because neither the Claims Court nor the Court of Appeals for the Federal Circuit has any special expertise in considering the state-law aspects of the controversies that give rise to disallowances under grant-in-aid programs. It would be nothing less than remarkable to conclude that Congress intended judicial review of these complex questions of federal-state interaction to be reviewed in a specialized forum such as the Court of Claims. More specifically, it is anomalous to assume that Congress would channel the review of compliance decisions to the regional courts of appeals . . . and yet intend that the same type of questions arising in the disallowance context should be resolved by the Claims Court or the Federal Circuit.

Id. at 907-08 (citations and footnotes omitted).

Just as in *Bowen*, it would be "remarkable to conclude" that Congress, having vested exclusive jurisdiction to grant declaratory and injunctive relief in the district courts, intended that § 1500 should force plaintiffs to choose between prospective equitable relief and compensation or, if equitable relief is chosen, to be deprived of a right to just compensation for a regulatory taking under the Fifth Amendment. The more likely conclusion is that Congress, in defining and limiting the jurisdiction of the district and Claims Courts, amended § 1500.

The conclusion that pending suits for declaratory and injunctive relief in the district courts should not bar suits in the Claims Court for compensation under the Fifth Amendment is entirely consistent with principles of *res judicata* set forth by this Court. In *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), plaintiffs had entered into a settlement of a prior lawsuit seeking both injunctive relief and damages under the anti-trust laws. The lawsuit was dismissed "with prejudice." Several years later, the plaintiffs initiated a second suit for damages, against the same defendants and some new parties. This Court held that the doctrine of *res judicata* did not bar the second lawsuit.

> A combination of facts constituting two or more causes of action on the law side of a court does not congeal into a single cause of action merely because equitable relief is also sought. And, as already noted, a prior judgment is *res judicata* only as to suits involving the same cause of action. There is no merit, therefore, in the respondents' contention that petitioners are precluded by their failure in the 1942 suit to press their demand for injunctive relief. Particularly is this so in view of the public interest in vigilant enforcement of the anti-trust laws through the instrumentality of the private treble-damage action.

> Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of *res judicata*.

Id. at 328-29 (footnote omitted).

Similar reasoning shows that § 1500 should not be held to require dismissal of a Tucker Act claim because the plaintiff is simultaneously pursuing declaratory and injunctive relief in a different court. An action for equitable relief should not be held to "merge" all other possible causes of action, including an action for compensation for a regulatory taking. Such a holding would thereby immunize the government from being required to pay compensation under the Fifth Amendment, a result nowhere suggested in the history of the statute.

II. BECAUSE A RULING THAT § 1500 BARS CONCURRENT PROSECUTION OF SEPARATE ACTIONS FOR EQUITABLE AND MONETARY RELIEF WAS NOT NECESSARY TO THE RESOLUTION OF THE CONTROVERSY BEFORE THE COURT, THAT PORTION OF THE RULING SHOULD BE VACATED.

A. The Issue Of Applicability Of § 1500 To Causes Of Action Seeking Relief Uniquely Within The Jurisdiction Of Different Courts Was Not Before The Court Of Appeals.

UNR, and the cases decided with *UNR*, including Petitioner's suit, involved parties pursuing alternative theories of monetary recovery against the United States. As summarized in the opinion by the Claims Court below, the claims were identical:

> All complaints in other courts and the Claims Court cases seek recovery for costs and expenses incurred

> and other damages engendered by suits brought by shipyard workers against plaintiffs alleging injury from exposure to asbestos or asbestos products.

Keene Corp. v. United States, 17 Cl.Ct. 146, 156 (1989), *aff d*, 962 F.2d 1013 (Fed. Cir.), *cert. granted*, 113 S.Ct. 373, 61 U.S.L.W. 3301 (U.S. Oct. 19, 1992).

In *British American Tobacco Co. Ltd. v. United States*, 89 Ct.Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940), the Court of Claims rejected the argument that the term "claim" referred only to the legal theory on which suit was brought and not to the subject matter of the suit. *Id.* at 440. As the *UNR* court paraphrased the *British American* holding, "even though a district court action may sound in tort and the one in the Court of Claims may sound in contract, if they are based on the same operative facts, they are the same claim." *UNR*, 962 F.2d at 1019.

But the *UNR* court did not hold that Petitioner's and the other parties claims fell within the holding of *British American*, or even limit its holding to the questions presented by the pending claims of Petitioner and the other parties before it. Rather, in a footnote and without explanation, the *UNR* court went on to announce the overruling of *Casman v. United States*, 135 Ct.Cl. 647 (1956), and cases following *Casman*. *UNR*, 962 F.2d at 1022 n.3.

In *Casman*, the plaintiff alleged in his district court suit that he had been wrongfully terminated from his government position. The district court ordered his reinstatement, an equitable remedy that was beyond the power of the Court of Claims to grant. While the government's appeal from the district court order was pending, Casman commenced an action in the Court of Claims seeking a different remedy, a monetary judgment for back pay. That action could be brought only in the Court of Claims. *Casman*, 135 Ct.Cl. at 650. The Court of Claims refused to dismiss the second action because the relief sought in

the two cases was "entirely different" and the claim for back pay was

> exclusively within the jurisdiction of this court, and there is no other court which plaintiff might elect. . . . On the other hand, the Court of Claims is without jurisdiction to restore plaintiff to his position.

Id. at 650 (citations omitted).[6]

The issue decided in *Casman*, i.e., the ability of a plaintiff to maintain a cause of action and obtain a form of relief in the Court of Claims that was beyond the power of the district courts while seeking district court relief not available in the Court of Claims, was not before the *UNR* court. Indeed, the *UNR* court was not required to reach the question of *Casman*'s continuing vitality.

The government, in its brief, merely asserted that "[t]he same 'claim' is deemed to exist when the suits involve 'the same operative facts and request the same substantive relief.'" *Brief for Appellee United States* before the United States Court of Appeals for the Federal Circuit in *UNR Industries, Inc., et al. v. United States*, at 21, *quoting Hill v. United States*, 8 Cl. Ct. 382, 386 (1985). It urged the Federal Circuit to overrule *Casman* only if *Casman* was found to apply. *Id.* at 43. As shown below, however, the appeals court did not apply *Casman* to the facts before it and, if it had done so, would have been required to conclude that *Casman* did not apply.

The Petitioner, Keene, did assert, citing *Casman*, that because its suit in the Claims Court included a Fifth Amendment claim for relief (for payments to asbestos-injured workers recouped from Keene by the government) different from the claims for monetary damages in its district court indemnification

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[6] Since *Casman* was decided, Congress has granted the district court jurisdiction to award back pay, up to $10,000. *See* 28 U.S.C. § 1346(d).

suit, the Claims Court had jurisdiction. *UNR*, at 1024. But the Federal Circuit did not even decide that *Casman* was pertinent to Petitioner's Fifth Amendment claim. Rather, it simply noted, without discussion, that *Casman* had been overruled elsewhere in the opinion and "as of today, *Casman* and its progeny are no longer valid." *UNR* at 1025.

Had the effect of *Casman* on Petitioner's Fifth Amendment claim been considered, it clearly would not have been dispositive, because the holding of *Casman* was that a pending cause of action in another court, for a remedy, i.e., equitable relief, not available in the Claims Court, does not divest the Claims Court of jurisdiction over causes of action and remedies which are committed exclusively to its authority. Petitioner's district court suit for indemnification did not seek the equitable, declaratory and/or injunctive relief essential to the holdings of *Casman* and *Truckee-Carson Irrigation District*, among other cases. Thus, the overruling of *Casman* in the context of Petitioner's and the other claims before the Federal Circuit was, simply, dictum.

B. The Circuit Court's Ruling On An Issue Not Necessary To Resolve The Controversy Before It Was Beyond Its Jurisdiction.

This Court has consistently ruled that broad language unnecessary to the court's decision is not considered binding authority. *Kastigar v. United States*, 406 U.S. 441, 454-455 (1972); *McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981). As the Court of Appeals for the Seventh Circuit has explained:

> [W]hat reasons there are against a court's giving weight to a passage found in a previous opinion . . . [include] the passage was unnecessary to the outcome . . . and therefore perhaps not as fully considered as it would have been if it were essential . . . the passage was not an integral part of the earlier opinion — it can be sloughed off without damaging

> the analytical structure of the opinion, . . . the passage was not grounded in the facts of the case . . . [or] the issue addressed in the passage was not presented as an issue, hence was not refined by the fires of adversary presentation. All of these are reasons for thinking that a particular passage was not a fully measured judicial pronouncement . . . *and indeed that it may not have been part of the decision that resolved the case or controversy on which the court's jurisdiction depended (if a federal court).*

United States v. Crawley, 837 F.2d 291, 292-293 (7th Cir. 1988) (emphasis added).

A statement that is only dictum because it is not an issue between the parties to a controversy is, therefore, indistinguishable from a mere advisory opinion, or a judgment on an issue which has become moot. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). As this Court has stated,

> The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. . . . This court is without power to give advisory opinions. . . . It has long been its considered practice not to decide abstract, hypothetical or contingent questions. . . .

Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945) (citations omitted). For a "controversy" to be justiciable, .

> [t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts. . . . Where there is such a

> concrete case *admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged*, the judicial function may be appropriately exercised. . . .

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted) (emphasis supplied).

Because there was no controversy between the parties that required the *UNR* court to review the holding of *Casman*, the Federal Circuit's overruling of *Casman*, rendered in a footnote, without explanation, was not just dictum, suffering from all of the weaknesses of dicta adverted to in *Crawley*. It was, in fact, nothing more than a decision of an abstract or hypothetical question. It was beyond the jurisdiction of the court below and that portion of the decision should be vacated.

CONCLUSION

Section 1500 is a statute intended by Congress, and interpreted by this Court, to be a substitute for principles of *res judicata*. The doctrine of *res judicata* precludes relitigation, after a ruling on the merits, of the same cause of action. The decision of the Federal Circuit in *UNR*, focusing only on whether, under § 1500, the presence of the same "operative facts" in two separate causes of action precludes jurisdiction in the Claims Court, falls far short of the analysis required to determine when a cause of action is barred by application of *res judicata* principles.

Where the relief sought in the district court is equitable in nature and not for monetary damages, different legal rights are pleaded in the district court and Claims Court, and there is no possibility of conflicting outcomes, *res judicata* would not bar an action in the Claims Court. Thus, § 1500 should not be a jurisdictional bar solely because of an inadequate inquiry limited to "operative facts."

This reasoning is reflected in the consistent interpretation of § 1500 by this Court; the Claims Court and its predecessor, the Court of Claims; and the Federal Circuit, as barring jurisdiction in the Claims Court only where the two causes of action were based on the same facts and, also, both forums were capable of granting the same relief.

The conclusion that § 1500 should not be a bar follows from the limited and exclusive jurisdiction of the district court and Claims Court. The inadequacy of Claims Court jurisdiction to review governmental action has been recognized by this Court. Congress, through legislation defining and limiting the jurisdiction of the respective courts, has, by and large, dealt with the problem which confronted the drafters of the original version of § 1500, that of courts with concurrent jurisdiction and authority to grant monetary damages. It should not be assumed

that by directing claimants against the government to the district courts for some causes of action (i.e., for declaratory and injunctive relief), and to the Claims Court for compensation for a taking of property for a public purpose, Congress intended that § 1500 would deny those same claimants the right to the complete relief available only by litigation in both courts. Accordingly, the inadequate "operative facts" standard should be reversed.

Because the *UNR* court was not required to decide the issue whether a suit in district court for equitable (i.e., declarative and injunctive) relief should bar maintenance of a separate cause of action in the Claims Court for compensation, the Federal Circuit's overruling of *Casman* and other cases was beyond its

jurisdiction. For that reason, also, that portion of the ruling below should be vacated.

Respectfully submitted,

CHARLES E. COLE
Attorney General for the State of Alaska

Office of the Attorney General
P.O. Box K - State Capitol
120 4th Street, 4th Floor
Juneau, Alaska 99811-0300
(907) 465-3600

Attorney of Record

RONALD G. BIRCH
J. GEOFFREY BENTLEY

BIRCH, HORTON, BITTNER AND CHEROT
1155 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036
(202) 659-5800

Of Counsel

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